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IN THE

Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
Petitioner,

v.

BRENTWOOD ACADEMY,
Respondent.

CORRECTED COPY

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER *ET AL.* IN SUPPORT OF RESPONDENT

MARCIA D. GREENBERGER
JOCELYN F. SAMUELS
DINA R. LASSOW
NATIONAL WOMEN'S LAW CENTER
11 DuPont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180

VIRGINIA A. SEITZ*
KIMBERLE E. DODD
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

March 26, 2007

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae, National Women's Law Center and 21 other organizations, are dedicated to the achievement of equality of opportunity for all students without discrimination based on gender, race, national origin, or disability. Individual descriptions of each *amicus* are set forth in Appendix A. All *amici* have a strong interest in ensuring that the Equal Protection Clause of the Fourteenth Amendment to the Constitution, which mandates that no State shall "deny to any persons within its jurisdiction the equal protection of the laws," continues to apply to state high school athletic associations and other entities whose conduct is "fairly attributable to the State." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

Seeking to evade constitutional standards, states and state institutions may utilize a variety of means to maintain control of programs such as high school athletics while appearing to delegate authority to a separate private entity. *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001) ("*Brentwood I*"), is an important component of this Court's state action jurisprudence which ensures that constitutional protections will be provided when a nominally private entity engages in actions that are "fairly attributable" to the state. *Id.* at 295. This Court should reject petitioner's request that it revisit *Brentwood I*.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. In *Brentwood I*, this Court held that the Tennessee Secondary School Athletic Association ("TSSAA") acts "under color of" state law, 42 U.S.C. § 1983, and that its actions are therefore subject to constitutional scrutiny. On

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[1] No person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and the letters of consent have been filed with the Clerk.

remand, the court of appeals held that TSSAA had violated the First Amendment and the Due Process Clause, and this Court granted the petition for review of that decision. TSSAA challenges the judgment that the First Amendment and Due Process Clause were violated on the merits, but also asks this Court to reconsider and overrule its 2001 decision that TSSAA is a state actor. The parties have focused on the First Amendment and Due Process questions and address the state actor question only briefly. *Amici* do not address the underlying constitutional questions but, for numerous reasons, strongly oppose TSSAA's contention that *Brentwood I* should be overruled.

First, TSSAA has utterly failed to demonstrate any "special justification" for overruling *Brentwood I* under this Court's *stare decisis* doctrine. See *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). TSSAA does not contend that there has been a change in either the relevant legal framework or in this Court's understanding of state action principles, undermining and thus justifying a reconsideration of *Brentwood I*. Instead, TSSAA contends that *Brentwood I* was a "significant departure" from established state action jurisprudence that has proven confusing and unworkable in the lower courts. Neither contention bears examination.

Brentwood I is wholly consistent with this Court's established case law addressing when a seemingly private entity "may fairly be said to be a state actor." *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 50 (1999). Like the state action cases that came before it, *Brentwood I* acknowledges that the state action inquiry is necessarily highly fact dependent, and that the ultimate inquiry is always whether the actions of the private party are "fairly attributable" to the state. 531 U.S. at 295. See, *e.g.*, *Lugar*, 457 U.S. at 937 (same).

The subsidiary inquiries that this Court has established to aid lower courts in answering this fundamental question (such as the public function, nexus, symbiotic relationship, and

entwinement inquiries) are just that – aids to application of the fundamental test. Thus, far from being an "abrupt departure," *Brentwood I* mandates the same factual inquiry that this Court has always conducted, poses the same central question that this Court has always asked, and seeks to serve the same purposes that this Court has always sought to further in applying the Constitution. This result reached in *Brentwood I* is the logical outcome of this Court's precedent holding that when public entities control a nominally private entity, the latter's actions are fairly attributable to the state. See, *e.g.*, *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995). This point is illustrated by the fact that *prior* to the Sixth Circuit's decision that underlay *Brentwood I*, every court of appeals to consider the question had found state athletic associations to be acting under color of state law, and that dicta from this Court strongly supported that outcome. See *NCAA* v. *Tarkanian*, 488 U.S. 179, 193 n.13 (1988).

Second, *Brentwood I* has neither confused the lower courts nor set an "unworkable" standard. To the contrary, lower courts in every circuit routinely apply *Brentwood I* to assess the presence of state action without expressing any confusion or evincing any difficulty in doing so. The dicta that TSSAA and its *amicus*, the National Collegiate Athletic Association ("NCAA"), cite to demonstrate confusion and unworkability fail to do so. When read in context, they say nothing more than that this Court has settled on a fact-intensive inquiry for the state action test; that this Court has suggested a number of different ways that private parties may be deemed to act under color of state law; and therefore that there is no bright-line test. Instead, courts must carefully consider all the facts in light of the Court's cases and decide whether the private party's actions are fairly attributable to the state. This inquiry may be time consuming and is focused on facts, but it is neither confusing nor unworkable.

The decision in *Brentwood I* is correct, and the legal test for state action is workable. Some legal standards inherently

require fact-intensive analysis, and federal district courts are fully capable of applying this Court's standard and making the required assessment. This is no different than numerous other areas of federal law, such as the admission of expert testimony or assessment of entitlement to preliminary relief. See *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S, 579 (1993); *eBay* v. *Merck Exch., L.L.C.*, 126 S. Ct. 1837 (2006).

The Court's conclusion that TSSAA is a state actor fits comfortably within this Court's state action precedent, prescribes a workable factual inquiry with a clear and understandable ultimate test ("fairly attributable"), is consistent with the prior results in the courts of appeals, and is correct. It should not be overruled.

2. Recognizing that state athletic associations are state actors is important to ensuring the guarantee of equal protection because these associations govern nearly every aspect of interscholastic athletics throughout their states. This outcome has not unduly burdened state athletic associations. Indeed, the state athletic associations did not address the state actor question in their *amicus* briefs. See Brief *Amicus Curiae* of Nat'l Fed. of State High Sch. Ath. Ass'ns; Brief *Amici Curiae* of the Arizona Interscholastic Ass'n.

Participating in athletics has far-reaching educational, physical, psychological and sociological benefits for all high school students, but particularly for female and minority students. Athletic participation expands academic opportunities and promotes academic achievement in addition to offering important life lessons and skills. Further, sports participation provides specific and significant physical and mental health benefits to female and minority students. Unfortunately, the promise of equal protection has yet to be fully realized with respect to female and minority students' opportunities to participate in athletics and play on a level field, and the application of the Equal Protection Clause to high school athletic associations is critical to progress towards equality.

Thus far, states have been unable to insulate themselves from the constitutional guarantee of equal protection by creating the appearance of distance between the state and the athletic associations. By finding that TSSAA is a state actor, *Brentwood I* simply continued on the pathway already marked by this Court's state action decisions. There is no reason, let alone a special justification, to overrule *Brentwood I*.

ARGUMENT

I. *BRENTWOOD I* IS CORRECT AND SHOULD NOT BE OVERRULED.

The doctrine of *stare decisis*, the rule of judicial adherence to precedents, "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). And, "[a]lthough adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification." *Rumsey*, 467 U.S. 212. See also *United States* v. *Dixon*, 509 U.S. 688, 711 (1993) ("[w]e do not lightly reconsider a precedent").

There is no contention here that this Court's state action cases following 2001 have undermined *Brentwood I* or that the Court has come to see the facts and circumstances presented in *Brentwood I* differently in light of the passage of time. Cf. *Agostini* v. *Felton*, 521 U.S. 203, 235-40 (1997) (overruling a decision because of a significant change in the Court's Establishment Clause law since the case at issue was decided). Instead, TSSAA and its *amicus* claim to have two types of the necessary "special justification" for overruling *Brentwood I*.

First, they say that *Brentwood I* constitutes a "significant departure" from established state actor jurisprudence. See

Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200, 231-32 (1995) (overruling decision as "a significant departure" from longstanding precedent); *Dixon*, 509 U.S. at 704-12 (overruling a decision found to be "wholly inconsistent with earlier Supreme Court precedent").

Second, they contend that the Court is not "'constrained to follow'" *Brentwood I* because it is "unworkable." See *Payne*, 501 U.S. at 827-30 (overruling decisions because they "have defied consistent application by the lower courts"); *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 854-61 (1992) (noting "practical workability" inquiry).

As we now show, both contentions lack merit.

A. *Brentwood I* Incorporates And Adopts Past State Actor Decisions.

TSSAA first erroneously argues that *Brentwood I* was a break from this Court's precedents and should therefore be reconsidered by the Court. See Pet. Br. 46-50. A fair reading of *Brentwood I* reveals that it in no way departs from prior Supreme Court cases, let alone abruptly does so. *Brentwood I* is simply an explication of and extrapolation from the Court's extant state actor jurisprudence. The fundamental inquiry to determine whether a private party is acting under color of state law is whether that party's actions are "fairly attributable to the State." See *Lugar*, 457 U.S. at 937; *Blum* v. *Yeretsky*, 457 U.S. 991, 1004 (1982). *Brentwood I* does not depart from this test: It *applies* it. *Brentwood I*, 531 U.S. at 295.

Similarly, as in past cases, the Court acknowledged and adhered to the highly fact-bound nature of the state actor inquiry to determine whether "an ostensibly private organization or individual is to be treated . . . as . . . a State." *Brentwood I*, 531 U.S. at 295. See, *e.g.*, *Lugar*, 457 U.S. at 939 (characterizing the state actor test as a "necessarily fact-bound inquiry"). The Court stated "[o]ur cases have identified a host of facts that can bear on the fairness of" attributing the actions of a private entity to the State.

Brentwood I, 531 U.S. at 296 (listing the State's exercise of coercive power, the State's encouragement of certain activity, the private party's willful participation in joint action with the State, the State's control of a private party, the State's delegation of a public function to a private party, and the State's entwinement with a private party's management and control). As the Court summarized, "[a]midst such variety, examples may be the best teachers." *Id.*

The individual Court cases addressing the state actor question, and the particularized inquiries that have grown up to aid in applying the "fairly attributable" standard, are simply tools for the lower courts to utilize in order to guide their inquiry into the facts and their application of the "fairly attributable" test. The Court's entwinement analysis in *Brentwood I* thus fits comfortably within the established state actor precedent. Indeed, in describing the entwinement examples, *Brentwood I* cites *Evans* v. *Newton*, 382 U.S. 296 (1966), which uses the entwinement formulation. See 531 U.S. at 296, 301 (a challenged action may be state action "when it is 'entwined with governmental policies' or when government is 'entwined in [its] management or control'"). TSSAA disagrees that its actions are fairly attributable to the State, but the *Brentwood I* analysis is built on and consistent with this Court's established approach and authority.[2]

Numerous lower courts have recognized that in the arena of state action, "'examples may be the best teachers,' providing th[e] [lower] court[s] with guidance with which to address

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[2] In arguing that *Brentwood I*'s entwinement inquiry is a virtually limitless expansion of the state action doctrine, making any assertion that a private party is a state actor reasonable and calling into question the *Tarkanian* Court's decision that the NCAA is not a state actor, the NCAA (at 17-19) cites *Cohane* v. *NCAA ex rel. Brand*, 2007 WL 247710 (2d Cir. Jan. 25, 2007). This citation is misleading. In fact, the entwinement approach is not even at issue in *Cohane*, which remands for further discovery solely on the question whether "the NCAA was a 'willful participant' in joint activity with the State." *Id.* at *2.

this question." *Village of Bensenville* v. *FAA*, 457 F.3d 52, 65 n.5 (D.C. Cir. 2006) (citation omitted) (quoting *Brentwood I*, 531 U.S. at 296). See also *Conner* v. *Salina Reg'l Health Ctr., Inc.*, 56 F. App'x 898, 902 (10th Cir. 2003) ("the Supreme Court has developed, and we have utilized, a variety of approaches to assist in determining if state action exists"); *Jenkins* v. *Area Coop. Educ. Servs.*, 248 F. Supp. 2d 117, 123 (D. Conn. 2003) (*Brentwood I* does not set forth a bright-line test for state action but rather illuminates the factors that should be considered in resolving the issue), *modified on other grounds*, 2004 WL 413267 (D. Conn. Feb. 25, 2004). As one district court explained after describing the different approaches to state action summarized in *Brentwood I*:

> [w]hile described as "tests," there is some reason to believe these are but factors or circumstances to consider. Recently, the Supreme Court, in *Brentwood Academy*, noted that whether an ostensibly private actor could fairly be considered a state actor is a matter of judgment, without rigid criteria or guidance. This notion is *not a departure* from prior Supreme Court cases . . . . [*Keeling* v. *Schaefer*, 181 F. Supp. 2d 1206, 1228 (D. Kan. 2001) (citation omitted) (emphasis added).]

Indeed, many lower courts treat *Brentwood I* as simply clarifying this Court's pre-existing analysis for finding state action by an otherwise private entity. See *Tool Box* v. *Ogden City Corp.*, 316 F.3d 1167, 1176 (10th Cir. 2003), *vacated on other grounds on reh'g en banc*, 355 F.3d 1236 (10th Cir. 2004); *Marvin* v. *North Cent. Iowa Mental Health Ctr. Inc.*, 2004 WL 2075469, at *4 (N.D. Iowa Sept. 17, 2004) ("*Brentwood* . . . clarified the test for 'state action.'").

The fundamental approach that *Brentwood I* takes with respect to high school athletic associations thus reflects the approach taken in previous cases addressing the question whether the actions of a nominally private entity are fairly attributable to the state. For example, in *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957) (per

curiam), this Court held that a college that was built and maintained by a private trust, but was operated and controlled by a board of state appointees, was a state actor, and therefore that its refusal to admit black students was "discrimination by the State." *Id.* at 231.

Likewise, in *Evans*, 382 U.S. at 301, this Court held that private trustees who held title to and controlled a park for whites only were subject to the Fourteenth Amendment. This Court stated that the park had been controlled by the city for years and served a public purpose (providing recreational opportunities to the community). Therefore, the Court found that the park did not lose its public nature when private trustees took over its operation, stating that "[i]f the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment." *Id.*

Similarly, in *Lebron*, this Court decided that Amtrak, an operator of passenger trains organized under federal law to pursue a public objective "under the direction and control of federal governmental appointees," 513 U.S. at 398, was a state actor. Critical to the Court was the state's retention of authority to appoint a majority of the private corporation's directors. *Id.* at 400.

In light of this precedent, it is not surprising that even before *Brentwood I*, this Court, in the course of finding that the NCAA is not a state actor, had in dicta indicated that state high school athletic associations are. See *Tarkanian*, 488 U.S. at 193 n.13 ("[t]he situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign"). The Court cited with approval two courts of appeals decisions holding that high school athletic associations composed primarily of public schools are state actors. *Id.* (citing *Clark* v. *Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982) and *Louisiana High Sch. Athletic Ass'n* v. *St. Augustine High*

Sch., 396 F.2d 224 (5th Cir. 1968)). Indeed, all courts of appeals to consider the question other than the Sixth Circuit reached that conclusion. See also *Griffin High Sch.* v. *Illinois High Sch. Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987); *In re United States ex rel. Mo. State High Sch. Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982); *Moreland* v. *Western Pa. Interscholastic Athletic League*, 572 F.2d 121, 125 (3rd Cir. 1978); *Oklahoma High Sch. Athletic Ass'n* v. *Bray*, 321 F.2d 269, 273 (10th Cir. 1963). As this authority reveals, the contention of *amicus* NCAA that *Brentwood I* left state athletic associations confused (Br. 2) simply makes no sense. After these decisions and *Tarkanian*, state athletic associations were fully on notice that they were state actors.

Finally, not all commentators critical of *Brentwood I* cited in the NCAA's brief (at 16) consider the case an abrupt departure from this Court's state actor decisions. For example, one author states that it "would surely grossly exaggerate the significance of *Brentwood* to regard it as a watershed for the Court's more moderate members, or as a turning point in state action jurisprudence." Alan R. Madry, *Statewide School Athletic Associations and Constitutional Liability; Brentwood Academy* v. *Tennessee Secondary School Athletic Association*, 12 Marq. Sports L. Rev. 365, 394 (2001). Indeed, he opines that the "notion of entwinement that Justice Souter introduced in *Brentwood* is also *easily assimilated* into the Rehnquist paradigms as yet another way in which the state might be causally responsible for the acts of a private party." *Id.* (emphasis added).

In sum, *Brentwood I* is a straightforward articulation and application of pre-existing state action analysis. As such, *Brentwood I* does not constitute a departure – let alone a significant one – from prior Supreme Court state actor jurisprudence.

B. *Brentwood I*'s Standard Is Workable.

TSSAA next claims that *Brentwood I* is unworkable. It argues that "[l]ower courts have been confused by *Brentwood I*'s new 'entwinement' doctrine, describing it as 'labyrinthine,' 'nebulous,' 'vague,' and a 'freewheeling *gestalt* analysis.'" Pet. 28 (citations omitted); see also Pet. Br. 46-50. Indeed, TSSAA claims that lower courts are confused about how many tests there are. TSSAA is wrong again. Even the few cases TSSAA cites do not support its claim of unworkability, and the vast bulk of cases applying *Brentwood I* do so in a workmanlike fashion, examining the facts presented and sometimes finding action under color of state law and sometimes rejecting that characterization. TSSAA's complaint is no more than that this Court has set forth a general test that requires a highly detailed factual inquiry.

First, TSSAA cites six cases in support of the contention that lower courts have been confused by the entwinement analysis of *Brentwood I*. In four of these six cases, the critical dicta is *not* addressed to *Brentwood I*'s entwinement inquiry. Instead, the dicta describe the state action doctrine in general terms, and in particular refer to the highly fact-specific nature of the analysis. For example, in *Leshko* v. *Servis*, 423 F.3d 337 (3d Cir. 2005), the court does not express confusion regarding *Brentwood I*'s entwinement analysis, but rather notes the complexity of the state action inquiry. The court then discusses the tests applied to private persons in determining the presence of state action and concludes no state action is present. This is the full sentence in which the quote selected by TSSAA appears: "We weave our way in this appeal through the Supreme Court's *labyrinthine* state action jurisprudence." *Id.* at 338 (emphasis added to portion quoted by TSSAA). This makes clear that the court was referring to the complexity of the jurisprudence generally, and not to the entwinement approach.

Likewise in *Tancredi* v. *Metropolitan Life Insurance Co.*, 378 F.3d 220 (2d Cir. 2004), the court is referring to the state

action doctrine generally when it states that *Brentwood I* "illustrates the *nebulous* character of the state action test." *Id.* at 230 (emphasis added). The court does discuss the entwinement analysis in *Brentwood I*, but expresses no confusion about its application or import.[3]

The other two cases cited by TSSAA also do not express either confusion about *Brentwood I* or any inability to apply the decision. Indeed, contrary to NCAA's view that *Brentwood I* portends an "unrestrained expansion" of the state action doctrine (Br. 18), both courts ultimately conclude that the private party involved is *not* a state actor under *Brentwood I*. In *Kirtley* v. *Rainey*, 326 F.3d 1088 (9th Cir. 2003), the court states that the "nexus test" is "[a]rguably the most *vague* of the four approaches." *Id.* at 1094 (emphasis added to portion quoted by TSSAA). Of course, the nexus test preceded the entwinement analysis of *Brentwood I*. See *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (reciting nexus inquiry). And in *Gross* v. *Fond Du Lac County Agricultural Society, Inc.*, 2005 U.S. Dist. LEXIS 19537 (E.D. Wis. Sept. 6, 2005), the court stated that *Brentwood I* "suggests a liberal and *freewheeling gestalt analysis,* eschewing bright lines for 'normative judgments' and counseling against 'rigid simplicity' in favor of fairness." *Id.* at *23 (emphasis added to portion quoted by TSSAA). Of course, the fact intensity of the state actor analysis preceded *Brentwood I* and is well established. See *supra* at 6-8. And, individual inquiries such as the public function, nexus and

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[3] *See also Crissman* v. *Dover Downs Entm't, Inc.*, 289 F.3d 231, 233 (3d Cir. 2002) (en banc) (court is addressing state action generally, not entwinement, when it notes that "*little is straightforward* in determining whether a private actor has acted 'under color of state law'") (emphasis added to portion quoted by TSSAA); *Willis* v. *Town of Marshall*, 293 F. Supp. 2d 608, 615 (W.D.N.C. 2003) (court is referring to all state action precedent when it states that "precedent regarding questions of state action is *anything but clear and consistent.*") (emphasis added to portion quoted by TSSAA).

entwinement inquiries, guide the lower court's discretion rather than increasing it. In any event, eschewing a bright line for fairness sounds like praise, rather than a cry of unworkability.

The state action inquiry always has been fact intensive, and criticism of it for that reason is nothing new.[4] This Court, however, has determined – and not for the first time in *Brentwood I* – that in this area, bright-line rules are not appropriate, and that the facts must be examined. As this Court has said in other contexts, "[w]e like [our legal standards] to be 'clear and unequivocal,' but only when they guide sensibly." *McNeil* v. *Wisconsin*, 501 U.S. 171, 182 (1991) (citation omitted). The lower courts are not confused by this holding.

Second, TSSAA argues that "[l]ower courts are even confused about how many different state action tests there are." Pet. 28. Again, the three decisions relied on by TSSAA fail to demonstrate any such confusion. Some courts focus on the list of approaches recited in *Brentwood I*, 531 U.S. at 296, while other courts group the approaches into more general categories. *Wang* v. *Blue Cross Blue Shield Ass'n*, 55 F. App'x 802 (9th Cir. 2003), is an example of the former phenomenon. See *id.* at 803. The court expresses no confusion regarding the state action inquiry; it conducts its analysis and concludes that no state action exists "under any relevant theories." *Id.* *Sabeta* v. *Baptist Hosp. of Miami, Inc.*, 410 F. Supp. 2d 1224 (S.D. Fla. 2005), is an example of the grouping approach. See *id.* at 1243-44 (grouping nexus and joint action under a "position of interdependence" approach). Again, the court simply concludes that "[u]nder

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[4] *See* Laurence H. Tribe, *American Constitutional Law* § 18-1, at 1690 (2d ed. 1988) (stating prior to *Brentwood I* that the "Court itself has acknowledged the stubborn individuality of the state action cases" and that "viewed doctrinally, the state action cases are 'a conceptual disaster area'").

any of these tests, [the] private behavior cannot be construed as state action." *Id.* at 1244. Finally, in *Keeling* v. *Schaefer*, 181 F. Supp. 2d at 1227-28, the court again simply groups the different approaches into more general categories. Evincing its full understanding of the state action test, the court correctly noted that "[w]hile described as 'tests,' there is some reason to believe these are but factors or circumstances to consider." *Id.* at 1228.

A comprehensive, rather than selective, examination of whether the lower courts are confused about applying *Brentwood I* reveals that they are not. Set forth in the note attached to this paragraph are cases from virtually all federal circuits decided after *Brentwood I* and evincing no confusion.[5]

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[5] **D.C. Circuit:** *Williams* v. *United States*, 396 F.3d 412 (D.C. Cir. 2005); *Bates* v. *Northwestern Human Servs., Inc.*, 466 F. Supp. 2d 69 (D.D.C. 2006).

First Circuit: *Logiodice* v. *Trustees of Me. Cent. Inst.*, 296 F.3d 22 (1st Cir. 2002); *Tomaiolo* v. *Mallinoff*, 281 F.3d 1 (1st Cir. 2002); *McGuire* v. *Reilly*, 271 F. Supp. 2d 335 (D. Mass. 2003), *aff'd*, 386 F.3d 45 (1st Cir. 2004).

Second Circuit: *Horvath* v. *Westport Library Ass'n*, 362 F.3d 147 (2d Cir. 2004); *Hamlin ex rel. Hamlin* v. *City of Peekskill Bd. of Educ.*, 377 F. Supp. 2d 379 (S.D.N.Y. 2005); *Doe* v. *Harrison, M.D.*, 254 F. Supp. 2d 338 (S.D.N.Y. 2003); *Curto* v. *Smith*, 248 F. Supp. 2d 132 (N.D.N.Y. 2003), *aff'd*, 93 F. App'x 332 (2d Cir. 2004) (table); *St. Ledger* v. *Area Coop. Educ. Servs.*, 228 F. Supp. 2d 66 (D. Conn. 2002).

Third Circuit: *Benn* v. *Universal Health Sys., Inc.*, 371 F.3d 165 (3d Cir. 2004).

Fourth Circuit: *Rossignol* v. *Voorhaar*, 316 F.3d 516 (4th Cir. 2003); *Mentavlos* v. *Anderson*, 249 F.3d 301 (4th Cir. 2001); *Stanley* v. *Gray*, 2007 WL 445366 (W.D. Va. Feb. 11, 2007); *Wall* v. *South Carolina*, 2006 WL 2443341 (D.S.C. Aug. 22, 2006).

Fifth Circuit: *Morris* v. *Dillard Dep't Stores, Inc.*, 277 F.3d 743 (5th Cir. 2001); *Liu* v. *SMU Sch. of Law*, 2003 WL 21435738 (N.D. Tex. June 16, 2003).

Moreover, as was true before *Brentwood I*, numerous lower courts have recognized that the state action inquiry is necessarily fact bound, flexible and highly circumstantial after *Brentwood I*. See, *e.g.*, *Tool Box*, 316 F.3d at 1177 (noting "the fact–intensive character of a state action determination"); *Conner*, 56 F. App'x at 902 (requiring a "fairly flexible approach in determining if state action exists"); *Crissman*, 289 F.3d at 234-43 ("the facts are crucial" in conducting a state action determination); *Richards* v. *City of Lowell*, 2007 WL 293583, at *18 (D. Mass. Jan. 31, 2007) (the "inquiry, under any of these theories, is necessarily fact-intensive, and the ultimate conclusions regarding state action

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Sixth Circuit: *Communities for Equity* v. *Michigan High Sch. Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3403 (U.S. Jan. 29, 2007) (No. 06-1038); *McCarthy* v. *Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399 (6th Cir. 2006); *Hughes* v. *Region VII Area Agency on Aging*, 423 F. Supp. 2d 708 (E.D. Mich. 2006); *Daniels* v. *Retired Senior Volunteer Program*, 2006 WL 783438 (S.D. Ohio Mar. 27, 2006).

Seventh Circuit: *Mitchell* v. *St. Elizabeth Hosp.*, 119 F. App'x 1 (7th Cir. 2004); *Gross*, 2005 U.S. Dist. LEXIS 19537; *Framsted* v. *Municipal Ambulance Serv., Inc.*, 347 F. Supp. 2d 638 (W.D. Wis. 2004).

Eighth Circuit: *Wickersham* v. *City of Columbia*, 371 F. Supp. 2d 1061 (W.D. Mo. 2005); *Hauschild* v. *Nielsen*, 325 F. Supp. 2d 995 (D. Neb. 2004); *Marvin*, 2004 WL 2075469.

Ninth Circuit: *Single Moms, Inc.* v. *Montana Power Co.*, 331 F.3d 743 (9th Cir. 2003); *Wang*, 55 F. App'x 802.

Tenth Circuit: *Tool Box*, 316 F.3d 1167; *Conner*, 56 F. App'x 898; *Johnson* v. *Rodrigues (Orozco)*, 293 F.3d 1196 (10th Cir. 2002); *Jornigan* v. *New Mexico Mut. Cas. Co.*, 2004 WL 3426437 (D.N.M. Apr. 19, 2004); *Keeling*, 181 F. Supp. 2d 1206.

Eleventh Circuit: *Loren* v. *Sasser*, 309 F. 3d 1296 (11th Cir. 2002) (per curiam); *Bevan* v. *Scott*, 2005 WL 2219433 (M.D. Fla. Sept. 13, 2005).

must be based on the particular facts and circumstances set forth in the record").[6]

The fact that an inquiry is flexible and requires a detailed factual analysis does not mean it is unworkable. District courts routinely and successfully conduct fact-bound inquiries in deciding mixed questions of law and fact. See, *e.g.*, *eBay*, 126 S.Ct. 1837; *Daubert*, 509 U.S. 579.[7] This Court has mandated such a detailed inquiry in the state action arena because different factual situations present different questions for courts seeking to determine whether a private party's actions can be "fairly attributed" to the state.

In sum, *Brentwood I* has neither confused the lower courts nor proven unworkable. Instead, *Brentwood I* is routinely applied by the federal courts in almost every circuit in conducting and resolving state action determinations. In reality, TSSAA is making a naked appeal to this Court to take the exceptional step of overruling its 2001 decision without providing the requisite special justification. TSSAA's disagreement with the outcome of this Court's detailed factual analysis is no basis for *Brentwood I's* reconsideration.

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[6] *See also Stanley*, 2007 WL 445366, at *5 ("'no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient'"); *Wall*, 2006 WL 2443341, at *7 (stating that the "determination is made considering the totality of the circumstances"); *Bevan*, 2005 WL 2219433, at *5 ("Supreme Court's prior decisions have 'identified a host of facts that can bear on the fairness of'" attributing seemingly private behavior to the State); *Curto*, 248 F. Supp. 2d at 138 n.9 ("*Brentwood* adopted a fact-sensitive, case-by-case analysis"); *Jenkins*, 248 F Supp. 2d at 123 (*Brentwood I* does not set forth a bright-line test for state action but illuminates the factors that should be considered in resolving the issue).

[7] *See also Richards* v. *Wisconsin*, 520 U.S. 385, 394 (1997) (instructing lower courts to conduct a fact-specific inquiry when determining whether a no-knock entry may be warranted and rejecting the pronouncement of any per se rule).

C. *Brentwood I* Is Correct.

As explained above, *Brentwood I*'s analysis is wholly consistent with this Court's state action precedent, and the conclusion it reached was foreshadowed by *Tarkanian* and the virtually unanimous holdings of the courts of appeals. Our demonstration that *Brentwood I* was not an abrupt departure from precedent thus also demonstrates that it was correctly decided.

Specifically, the Court held that the "nominally private character of the [TSSAA] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and [that] there is no substantial reason to claim unfairness in applying constitutional standards to it." *Brentwood I*, 531 U.S. at 298. The Court concluded that the TSSAA "ought to be charged with a public character and judged by constitutional standards" primarily because (i) 84% of TSSAA's membership is composed of public schools "represented by their officials acting in their official capacity to provide an integral element of secondary public schooling;" (ii) State Board members were assigned "ex officio to serve as members of the board of control and legislative council [of TSSAA];" and (iii) "the Association's ministerial employees [were] treated as state employees to the extent of being eligible for membership in the state retirement system." *Id.* at 299-302. As the Court held, entwinement to the pervasive degree it existed between TSSAA and the State requires a conclusion of state action. *Id.* at 302.

Moreover, treating state athletic associations as state actors in this factual context furthers the purposes of the state action requirement. In defining an area of state responsibility, this Court seeks to "preserve[] an area of individual freedom," and to "avoid[] imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 936. But when, as here, public schools are a voting majority of the athletic association and control the elections to the association's governing board,

treating the association as a state actor does not invade an area of individual freedom. And, where, as here, state officials effectively make the association's decisions, it is fair to attribute those decisions to the State. *Brentwood I*'s holding was correct and should stand.

II. RECOGNIZING STATE ATHLETIC ASSOCIATIONS AS STATE ACTORS IS CRITICAL TO ENSURING EQUAL PROTECTION OF THE LAWS.

A. High School Athletic Associations, As State Actors, Must Not Deny Equal Protection.

All public schools engage in state action within the meaning of § 1983 and the Fourteenth Amendment. Public school rules governing participation in interscholastic high school athletics are subject to challenge under the Fourteenth Amendment. Under *Brentwood I*, public schools cannot avoid their constitutional obligations by agreeing that a state high school athletic association will make all the rules, even if that association includes some private schools. This makes legal, logical and common sense.

The Equal Protection Clause of the Fourteenth Amendment to the Constitution mandates that "no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). This Court's state action precedent, including *Brentwood I*, ensures that opportunities to participate in interscholastic athletics are provided equally without regard to sex, race or ethnicity. As set forth *infra*, equal opportunity to participate in athletics is critically important to female and minority students due to the far-reaching educational, sociological, physiological and psychological benefits that result from sports participation.

As this Court stated in *Brentwood I*, interscholastic athletics play an integral part in secondary public schooling. See 531

U.S. at 299-300. The policies and practices adopted by state boards of education and public schools to govern interscholastic athletic programs must comply with the Equal Protection Clause. *E.g.*, *Brenden* v. *Independent Sch. Dist. 742*, 477 F.2d 1292 (8th Cir. 1973) (finding that the school could not prohibit girls from playing on boys' tennis and cross country teams solely on basis of sex).

In order to promote coordinated and workable systems of state-wide interscholastic athletics, states typically designate athletic associations to set contest rules, determine eligibility restrictions, and promulgate uniform policies and practices that govern nearly every aspect of interscholastic athletics throughout the states. States may not insulate themselves from their non-discrimination obligations by formally separating themselves from state athletic associations while nonetheless maintaining control.[8] TSSAA contends that "subjecting athletic associations to constitutional litigation

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[8] Students may also challenge certain discriminatory practices in interscholastic athletics of covered institutions pursuant to statutory rights contained in Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.*; Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d *et seq.*; and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 *et seq.* These statutory non-discrimination mandates do not supplant those in the Equal Protection Clause. In fact, these statutory rights and Constitutional rights differ in certain respects. For example, Title IX regulations explicitly exempt "contact sports" from certain non-discrimination requirements. Thus, a public school would not be forced to permit a girl to try out for the boys' basketball team under Title IX, even if the school fields no such team for girls. *See* 34 C.F.R. § 106.41(b). The female basketball player, however, would be able to pursue a discrimination claim under the Equal Protection Clause. By way of further example, in *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 732-33 (1982), this Court held that the University's women-only admission policy violated the Equal Protection Clause, even though the same claim was not allowed under Title IX which explicitly exempts schools that "traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex." 20 U.S.C. § 1681(a)(5).

will do little good and plenty of harm" because these associations cannot afford expensive litigation and such litigation may cause the end of "voluntary public-private interscholastic athletic competition" in the United States. Pet. Br. 19-20, 46-50. But state athletic associations have been subject to constitutional constraints for years without this alleged adverse consequence. And, as noted, the *amicus* briefs filed on their behalf do not address the state action issue.

Numerous courts have recognized the importance of ensuring that female and minority athletes receive an equal opportunity to participate in athletics by applying the Equal Protection Clause to state athletic associations. In *Brenden*, 477 F.2d at 1302-03, two Minnesota high school girls challenged as a violation of the Equal Protection Clause the state athletic association's rule prohibiting girls from participating on the boys' tennis and cross-country skiing and running teams, while the association's member schools provided no such teams for girls. The Eighth Circuit held that denying girls an opportunity to participate on a school non-contact sports team solely on the basis of sex was a denial of equal protection. *Id.* In *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224, 226-29 (5th Cir. 1968), African-American high school students challenged the state athletic association's denial of membership to a high school whose student body was completely African-American. The Fifth Circuit held that the athletic association violated the students' rights to equal protection by denying membership to a school because of the racial composition of its student body. *Id.*

Continuing to hold states accountable for the rules by which they govern interscholastic athletics is essential. As discussed below, sports participation is simply too important to the educational, physical, psychological and sociological well being of the nation's children and young adults to allow states to use the device of nominally independent athletic

associations to deny equality of opportunity to female and minority students.

B. Participating In Athletics Has Far-Reaching Benefits.

Sports participation benefits all high school students, but female and minority students who participate receive especially substantial results.

In 1997, the President's Council on Physical Fitness and Sport released a report on girls' involvement in physical activity and sports. The report confirmed that sports and physical activities are highly beneficial for girls, offering a wide range of educational, sociological, physiological, and psychological benefits. See The President's Council on Physical Fitness & Sports, *Physical Activity & Sports in the Lives of Girls* xiv-xv (Spring 1997) (hereinafter "*President's Council Report*"). Sports participation confers many of the same benefits on all minority students. *See* The Women's Sports Found., *Minorities in Sports: The Effect of Varsity Sports Participation on the Social, Educational and Career Mobility of Minority Students* 4-5 (Aug. 15, 1989) (hereinafter "*Minorities in Sports*").

First, athletic participation expands academic opportunities and promotes academic achievement by providing boys and girls from diverse socioeconomic, racial, and ethnic backgrounds measurable positive educational impacts, including improvements in self-concept, higher educational aspirations in the senior year, improved school attendance, increased math and science enrollment, more time spent on homework, and higher enrollment in honors courses. See H.W. Marsh, *The Effects of Participation in Sport During the Last Two Years of High School*, 10 Soc. Sport J. 18 (1993). Studies show that student athletes generally have higher grade point averages, better attendance records, and fewer disciplinary problems. See Nat'l Fed'n of State High Sch. Ass'ns, *The Case for High School Activities* (2004)

(hereinafter "*Case for High School Activities*") *available at* http://www.nfhs.org/web/2004/01/the_case_for_high_school_activities.aspx. On average, female athletes fare better academically than their non-athletic counterparts. See *President's Council Report* at xxiii. Young women who participate in sports have higher grades, higher scores on standardized tests, and are more likely to graduate from high school and college than non-athletes. See *id.*; NCAA, *2006 NCAA Graduation Rates Report* (2006), *available at* http://web1.ncaa.org/app_data/instAggr2006/1_0.pdf (NCAA graduation rates for women athletes remain high – 71% compared to 63% for the Division I female student body).

Athletic participation yields similar benefits for Black and Hispanic students. Minority athletes receive higher grades, are less likely to drop out, score higher on standardized tests, and aspire to hold leadership positions in their communities in greater percentages than their non-athletic counterparts. See *Minorities in Sports* at 4-5; Carol Herwig, *Report Stresses Role of Academics; High School Athletes: Winners On, Off Field,* USA Today, Aug. 16, 1989, at 8D (citing *Minorities in Sports*) (hereinafter "*Report Stresses Role of Academics*"); see also *The Case for High School Activities* (finding, in a state-wide, three-year study by the N.C. High School Athletic Association, that athletes had higher grade point averages, lower dropout rates, and higher high school graduation rates, than their non-athletic peers); Richard E. Lapchick, Univ. of Cent. Fla.'s Inst. for Diversity & Ethics in Sports, *Keeping Score When it Counts: Graduation Rates and Diversity in Campus Leadership for the 2004 Women's Sweet 16 Teams,* (Mar. 2004) (female athletes in the national basketball tournament had exceedingly high graduation rates). Similarly, Hispanic female athletes, especially from rural schools, are more likely than non-athletes not only to improve their academic standing while in high school, but also to graduate and to attend college following high school. *Minorities in Sports* at 14.

Second, sports offer students lifelong lessons. Playing high school sports is a predictor of later success in life. See *The Case for High School Activities*; see also Mass. Mut. Fin. Group, *New Nationwide Research Finds: Successful Women Business Executives Don't Just Talk a Good Game . . . They Played One* (2002), *available at* http://www.massmutual.com/mmfg/pdf/boardroom.pdf (more than four out of five executive businesswomen (81%) played sports growing up – and the vast majority reported that the lessons they learned on the playing field contributed to their success in business). Female and minority athletes are more likely to aspire to hold leadership positions later in life than non-athletes. See *Minorities in Sports* at 4; *Report Stresses Role of Academics*. In addition, female athletes develop a range of skills through participation in athletics, all of which are crucial to success in employment and adult life generally. Participation in interscholastic athletics offers young women "an opportunity to e[val]uate leadership skills, learn teamwork, build self-confidence, and perfect self-discipline." *Cohen* v. *Brown Univ.*, 991 F.2d 888, 891 (1st Cir. 1993).

Third, regular and rigorous physical exercise provides enormous physical and mental health benefits to women and minorities. Sports participation decreases a young woman's chance of developing heart disease, osteoporosis, and other health related problems. See The Women's Sports Found., *Her Life Depends On It: Sport, Physical Activity and the Health and Well-Being of American Girls* 8-12 (2004), *available at* http://www.womenssportsfoundation.org/binary-data/WSF_Article/pdf_file/990.pdf (hereinafter "*Her Life Depends On It*") (a comprehensive survey of scientific research on girls' health, sports participation, and physical activity); Donna A. Lopiano, *Testimony Before the U.S. Subcomm. on Consumer Affairs, Foreign Commerce and Tourism 3* (Oct. 18, 1995). A 1998 study found that former college athletes had a 35% lower chance of developing breast cancer and a 61% lower chance of developing reproductive

cancer compared to non-athletes. See Carol Krucoff, *Exercise and Breast Cancer,* Saturday Evening Post, Nov. 1995, at 22.[9] Moreover, in 1970, only one out of every twenty-one girls was obese or overweight; today, even though more girls are playing sports, that figure is an alarming one in six. See Fed. Interagency Forum on Child & Family Statistics, *America's Children in Brief: Key National Indicators of Well-Being* 8-9 (2004), *available at* http://childstats.gov/pubs.asp. The available research demonstrates that more physical activity and sports participation are fundamental solutions for many of the serious health and social problems faced by our nation's young girls. See *Her Life Depends On It* at 38.[10]

In terms of emotional and mental health, women who participate in sports have higher self-esteem, a lower incidence of depression, a more positive body image, and greater

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[9] Research also demonstrates that women who participate in regular physical exercise during their reproductive years have up to a 60% reduced risk of breast cancer. *See* Leslie Bernstein et al., *Physical Exercise and Reduced Risk of Breast Cancer in Young Women*, 86 J. Nat'l Cancer Inst. 1403 (1994) (reporting that one to three hours of exercise per week over a women's reproductive lifetime may bring a 20-30% reduction in the risk of breast cancer, and four or more hours of exercise per week may reduce the same risk by almost 60%).

[10] Similarly, osteoporosis afflicts 10 million Americans, 80% of whom are women. *See* Nat'l Osteoporosis Found., Fast Facts, *at* http://www.nof.org/osteoporosis/diseasefacts.htm (last viewed Mar. 20, 2007). Physical activity and sports participation in the school-age years have been shown to increase bone density. D. Teegarden et al., *Previous Physical Activity Relates To Bone Mineral Measures In Young Women,* 28 Med. & Sci. in Sports & Exercise 105 (Jan. 1996). Likewise, Alzheimer's disease mainly affects the oldest people in the United States, who are disproportionately women. D.A. Evans et al., *Prevalence of Alzheimer's Disease In A Community Population of Older Persons Higher Than Previously Reported,* 262 J. Am. Med. Ass'n, 2251 (1989). Higher levels of physical activity earlier in life may reduce the risk for Alzheimer's later in life. *See* Sandra K. Pope et al., *Will a Healthy Lifestyle Help Prevent Alzheimer's Disease?*, 24 Ann. Rev. of Pub. Health 111 (2003).

confidence and pride in their physical and social skills. See Debra L. Schultz, *Risk, Resiliency, and Residence: Current Research on Adolescent Girls* (1991) (citing Colton & Gore, *Gender Differences in Stress and Coping Behaviors Among Late Adolescents* (1991)); *President's Council Report* at 20-23, 25-26, and 28-30. Female high school athletes show a markedly lower incidence of considering or planning a suicide attempt, and women and girls who participate in regular exercise suffer lower rates of depression. See Don Sabo et al., *High School Athletic Participation and Adolescent Suicide: A Nationwide Study*, 40 Int'l Rev. for the Soc. of Sport 5 (2004) (on file with the Women's Sports Foundation); G. Nicoloff & T.S. Schwenk, *Using Exercise to Ward Off Depression*, 9 Physician Sports Med. 23, 44-58 (1995); R.M. Page & L.A. Tucker, *Psychosocial Discomfort and Exercise Frequency: An Epidemiological Study of Adolescents*, 29 Adolescence 113, 183-91 (1994) (physically active adolescents tend to feel less lonely, shy, and hopeless than their less physically active peers). The same correlation appears to be true for minority female athletes. See *Minorities in Sports* at 7.

Sports participation also helps teenagers successfully cope with the physical and mental health challenges and risks associated with adolescence. Teenage female athletes are less than half as likely to get pregnant as non-athletes (5% and 11%, respectively), more likely to report that they have never had sexual intercourse than female non-athletes (54% and 41%, respectively), and are more likely to experience their first sexual intercourse later in adolescence than female non-athletes. The Women's Sports Found., *Sport and Teen Pregnancy* 2-3 (May 1998). Significantly reduced rates of pregnancy result for African-American and Latina female athletes as well. *Id.*; see also T. Dodge & J. Jaccard, *Participation in Athletics and Female Sexual Risk Behavior: The Evaluation of Four Causal Structures*, 17 J. of Adolescent Res. 42 (2002); *President's Council Report* at

xxv-xxvi (citing studies suggesting that higher rates of athletic participation among adolescent girls were significantly associated with lower rates of sexual activity and pregnancy).

Physical activity also appears to decrease the initiation of high-risk health behavior such as smoking or illegal drug use in adolescent girls. See, *e.g.*, M.J. Melnick et al., *Tobacco Use Among High School Athletes and Nonathletes: Results of the 1997 Youth Risk Behavior Survey*, 36 Adolescence 727 (2001); see also *The Case for High School Activities* (concluding that 92% of high school athletes do not use drugs); The Women's Sports Found., *Health Risks and the Teen Athlete* 4, 8-9 (2000) *available at* http://www.womenssports-foundation.org/binary-data/WSF_Article/pdf_file/771.pdf (female athletes involved in school or community sports were significantly less likely to use marijuana, cocaine or most other illicit drugs); R.R. Pate et al., *Sports Participation and Health-Related Behaviors Among U.S. Youth*, 154 Archives of Pediatric & Adolescent Med. 904 (2000) (same); *The Case for High School Activities* (Wyoming survey in 1998 found that only 25% of high school athletes, compared to 40% of non-athletic high school students, smoke cigarettes); Deborah J. Aaron et al., *Physical Activity and the Initiation of High-Risk Health Behaviors in Adolescents*, 27 Med & Sci. in Sports & Exercise 1639, 1642 (1995) (female athletes are significantly less likely to initiate cigarette smoking than others).

Notwithstanding their successes, women and girls still continue to face barriers to equal athletic opportunities. In the 2005-06 school year, more than 4.2 million boys played high school sports, but fewer than 3.0 million girls played. In other words, only 41% of high school athletes were girls, even though girls made up 49% of all students. See Nat'l Fed'n of State High Sch. Ass'ns, *2005-06 Participation Survey* (2006), *available at* http://www.nfhs.org/core/content-manager/uploads/2005_06NFHSparticipationsurvey.pdf;

U.S. Census Bureau, *Current Population Survey Report* (Oct. 2005), *available at* http://www.census.gov/population/www/socdemo/school/cps2005.html. Many girls who play high school sports must tolerate inferior practice and game facilities and other unequal treatment. Minority female athletes receive even fewer athletic opportunities. U.S. Dep't of Health & Human Servs., *Physical Activity and Health: A Report of the Surgeon General; Executive Summary* 12, 14 (1996).

While full equality of opportunity in athletic participation has yet to be realized, the guarantee of equal protection contained in the Fourteenth Amendment, along with the statutory non-discrimination requirements of Titles IX and VI, have played a vital role in opening up competitive athletics to female and minority student athletes. To reach the goal of equal opportunity, states and their athletic associations must be required to fulfill their non-discrimination obligations.

CONCLUSION

For these reasons, *amici* urge this Court to reaffirm its determination that TSSAA is a state actor.

Respectfully submitted,

MARCIA D. GREENBERGER
JOCELYN F. SAMUELS
DINA R. LASSOW
NATIONAL WOMEN'S LAW CENTER
11 DuPont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180

VIRGINIA A. SEITZ*
KIMBERLE E. DODD
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

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*Counsel of Record

APPENDIX

APPENDIX A

DESCRIPTIONS OF *AMICI CURIAE* ORGANIZATIONS

The National Women's Law Center (Center) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of constitutional rights and Title IX in all arenas, including interscholastic and intercollegiate athletics.

For 125 years, the *American Association of University Women (AAUW),* an organization of over 100,000 members, has been a catalyst for the advancement of women and their transformation of American society. In more than 1,300 communities nationwide, AAUW plays a major role in mobilizing advocates on AAUW priority issues that promote equity for women and girls, including: creating equal opportunity in all levels of education; improving women's economic security through equal pay, family friendly workplaces, and preserving Social Security; reproductive rights; and other civil rights issues. AAUW believes athletic participation benefits women and girls in myriad ways, and supports gender equity in athletics as enforced through the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The mission of the *Association for Gender Equity Leadership in Education (AGELE)* is to provide leadership in the identification and infusion of gender equity in all educational programs and processes, and within parallel equity concerns, including, but not limited to, age, disability, ethnicity, national origin, race, religion, sexual orientation and socio-economic status. Recognizing state athletic associations to be state actors is important to our mission because it ensures the constitutional guarantee of equal

protection of the law to girls and young women in athletics and thereby promotes the numerous benefits for female athletes that stem from athletic participation.

The *California Women's Law Center (CWLC)* is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The CWLC was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: Gender Discrimination, Women's Health, Reproductive Justice and Violence Against Women. Since its inception, the CWLC has placed a strong emphasis on advancing the rights of women and girls in education, particularly the issues of discrimination, and access to equal opportunities in athletic programs and activities.

The *Connecticut Women's Education and Legal Fund (CWEALF)* is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. For the past three decades, CWEALF has provided legal information and conducted public policy and advocacy to ensure the spirit of Title IX is implemented and enforced in educational and athletic opportunities.

Dads & Daughters is the national nonprofit working to make the world safe and fair for our daughters. A strong structure of support for equity in education is essential to that mission – and essential to the well-being and future of all the nation's children. That structure would be crippled by a decision which holds that state interscholastic athletic associations are not state actors, and therefore are not subject to obligations such as vigorous enforcement of and commitment to equal protection of the law.

The *Disability Rights Education and Defense Fund, Inc. (DREDF)*, based in Berkeley, California, is a national law and

policy center dedicated to advancing and protecting the civil rights of people with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal civil rights laws protecting persons with disabilities.

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girl through litigation and advocacy. Founded in 1974, ERA has litigated historically important gender-based discrimination cases, including *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), *Richmond Unified School District* v. *Berg*, 434 U.S. 158 (1977), *Doe* v. *Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal 1993), *reconsid. granted*, 949 F. Supp. 1415 (N.D. Cal. 1996), and *Dukes* v. *Wal-Mart*, 474 F.3d 1214 (9th Cir 2007). ERA currently represents female students seeking to participate in athletics on an equal basis to male student athletes. Whether state high school athletic associations are state actors is an important issue to our constituents, many of whom are women and girls from racial and ethnic minorities, whose rights to equal protection of the law have often been denied.

The *Feminist Majority Foundation (FMF)*, founded in 1987, is the nation's largest feminist research and action organization dedicated to women's equality, reproductive rights and health, non-violence and equal educational opportunities. Our programs focus on advancing the legal, social and political equality of women with men, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, FMF engages in research and public policy development, public education programs, grassroots organizing projects, and leadership training and cultivation programs. It is important to our goals that state high school athletic associations be seen

as "state actors" and that they are held responsible for implementing civil rights protections.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. It is the nation's oldest legal advocacy organization devoted to women's rights. Legal Momentum, then known as NOW Legal Defense, pioneered the implementation of Title IX with PEER, its nationwide Project on Equal Education Rights, from 1974-1992. It was co-counsel in *Doe* v. *Petaluma City School District*, 949 F. Supp. 1415 (N.D. Cal. 1996), the first case to recognize that a school's failure to respond to peer sexual harassment may violate Title IX, and has appeared as *amicus* in numerous cases concerning the right to be free from sexual harassment and sex discrimination in education, including *Davis* v. *Monroe Count Board of Education*, 526 U.S. 648 (1999) and *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992).

Myra Sadker Foundation is a non-profit organization dedicated to promoting equity in and beyond schools. Myra Sadker, educator, author, and Dean at American University, exposed both the subtle and blatant education biases that limit the academic, psychological, economic and physical potential of both males and females. The foundation supports research, training and special programs to assist teachers, parents, children and other adults in eliminating such biases from America's schools.

The *National Association for Girls and Women in Sport (NAGWS)* is an organization with over 100 years of history in research, programming and advocacy for female athletes. It is one of the five national associations of the American Alliance for Health, Physical Education, Recreation and Dance (AAHPERD), a non-profit membership organization representing over 23,000 professionals in physical education and sport. Members of NAGWS have supported Title IX and gender equity initiatives for decades and continue to educate community members, athletes and professionals about these

issues through programs, research and publications. The mission of NAGWS is "to develop and deliver equitable and quality sport opportunities for ALL girls and women" so cases involving questions of enforcing prohibitions on discrimination on the bases of race, sex and national origin are of significant interest to the organization, especially as they relate to female athletes.

The *National Association of Social Workers (NASW)* is the largest organization of professional social workers in the world, with nearly 150,000 members. Created in 1955 by the merger of seven predecessor social work organizations, the purposes of NASW include improving the quality and effectiveness of social work practice in the United States and developing and disseminating high standards of social work practice, concomitant with the strengthening and unification of the social work profession as a whole. NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. NASW has long been committed to working toward the elimination of all forms of discrimination against women. NASW policies support "developing practices and programs that empower women and girls, enabling them to resist gender stereotypes; ... develop positive self-esteem and body image; ... and challenge sexual double standards, so girls and women might develop the power and sense of entitlement that fuels self-advocacy." NATIONAL ASSOCIATION OF SOCIAL WORKERS, *Women's Issues*, SOCIAL WORK SPEAKS, 387, 391 (2006).

The *National Council of La Raza (NCLR)* is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied

research, policy analysis, and advocacy. NCLR believes that recognizing state athletic associations to be state actors is important to ensuring the constitutional guarantee of equal protection of the law to girls in athletics. This guarantee promotes girls' participation in athletics, which has numerous benefits for them, particularly Hispanic girls, whose low educational attainment rates can be raised through participation in athletics.

The *National Organization for Women Foundation (NOW)* is a 501(c)(3) nonprofit organization devoted to furthering women's rights through education, litigation and advocacy. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist *organization* in the United States, with over 500,000 contributing members in more than 450 chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have included achieving equal educational opportunities for women and girls. To that end, NOW Foundation advocates for vigorously protecting girls' and women's critically important right to equal protection under the U.S. Constitution.

Founded in 1971, the *National Partnership for Women & Families* is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, access to quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of anti-discrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and federal circuit courts of appeals to advance women's opportunities in education.

The *Northwest Women's Law Center (NWWLC)* is a regional non-profit public interest organization that works to

advance the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Founded in 1978, the NWWLC has been, *inter alia*, dedicated to challenging barriers to sexual equality in education with a focus on eradicating gender discrimination through the enforcement of Title IX. Toward that end, the NWWLC participates as counsel and *amicus curiae* in cases throughout the Northwest, and the country, to ensure that women and girls at all educational levels have equal access to educational opportunities. The NWWLC was lead counsel in *Blaire* v. *Washington State University,* 108 Wn. 2d 558 (1987), a case that set important precedent requiring state universities to provide equal funding and scholarship opportunities for women's athletic programs. The NWWLC has also worked directly with numerous school districts and parent groups to monitor and enforce compliance with the mandates of Title IX. The NWWLC continues to serve as a regional expert and leading advocate on Title IX and gender equity.

The *Public Justice Center (PJC)* is a Maryland non-profit civil rights and anti-poverty organization that advocates nationally to protect the rights of the underrepresented. Established in 1985, the PJC has used impact litigation, appellate advocacy, public education, and legislative advocacy to accomplish law reform for its clients in numerous areas of civil rights, including gender discrimination, in employment, education, and access to government services.

The *Tennessee Lawyers' Association for Women (TLAW)* is a nonprofit professional organization whose purposes include seeking equal protection of the law and promoting equality of opportunity for women. TLAW is concerned that women and minorities will be foreclosed from challenging actions and decisions of the TSSAA on constitutional grounds and thus will find it more difficult to reach their full potential in athletics, the academic world, and their future careers.

The *Women's Bar Association of the District of Columbia (WBA-DC)*, founded in 1917, works to advance and protect the interests of women lawyers, to maintain the honor and integrity of the profession, and to promote the administration of justice. Among its many activities, WBA-DC develops and promotes the interests of women by monitoring legislation and filing *amicus* briefs on issues vital to women. WBA-DC has an interest in protecting the legal rights of girls and women, both within and outside of the legal profession, as guaranteed by Equal Protection Clause of the U.S. Constitution and by Title IX of the Education Amendments of 1972. The organization is particularly interested in protecting the right of girls to participate in athletics, a right which has historically advanced gender equality in society at large.

The *Women's Law Project (WLP)* is a non-profit public interest law firm located in Philadelphia, PA. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. The WLP has worked throughout its history to accomplish gender equity in school athletic programs at all levels, from middle school through college. The application of the non-discrimination clause of the Fourteenth Amendment to entities like state athletic associations that function as state actors in their regulation of public school athletic programs is essential to the ultimate elimination of discriminatory practices in these programs.

The *Women's Sports Foundation* is a 501(c)3 nonprofit education organization dedicated to advancing the lives of girls and women through sports and physical activity and ensuring equal participation and leadership opportunities for girls and women in sports and fitness. The Foundation distributes over 2 million pieces of educational information each year, awards grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a

year concerning Title IX and women's sports issues, and administers awards programs to increase public awareness about the achievements of women in sports. The Foundation is interested in this case because of its important implications for gender equity in sports. Specifically, at the high school level, girls continue to lag behind boys in the quantity and quality of athletic opportunities they receive. In fact, high school girls receive 1.3 million fewer opportunities to play sports than their male counterparts. The issue of whether state high school athletic associations are state actors is very important for all who care about equal opportunity for girls and women, since these associations have the power to help ensure that our daughters are given the same opportunities for competition as our sons.